Bank Industri & Teknologi Malaysia Bhd v Ironwoods Shipyard Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO 22–55 OF 2004–I
CLEMENT SKINNER J
17 FEBRUARY 2006

Contract — Construction of terms of contract — Loan — Construction of bridging line agreement and guarantee — Whether agreements allowed novation of contractual liability of defendants —

Contract — Novation — Existence of — Whether third party had assumed defendant's obligation or liability to pay plaintiff for loan taken — Conduct of defendant inconsistent with averment of novation — Whether plaintiff estopped from enforcing its rights under the contract

The plaintiff was a bank. The first defendant was a shipbuilder. The second to seventh defendants were guarantors of the first defendant in respect of a bridging loan granted to the first defendant by the plaintiff. The first defendant as shipbuilder had entered into a contract to build a vessel, the MT 'Sheta' for a company called Seri Mukali Sdn Bhd ('Seri Mukali'). On 26 July 1995, the plaintiff granted the first defendant banking facilities of RM2m, in the form of a Bridging Line upon terms and conditions set out in a Bridging Line Agreement of the same date ('the Bridging Line Agreement'). Seri Mukali also obtained its own financing to pay the first defendant for the building of MT 'Sheta' from Malayan Banking Bhd ('MBB'). The first defendant needed to install a marine engine in the vessel which it had ordered from the manufacturer in Canada, Ulstein Maritime Ltd, and wished to utilise the Bridging Line facility to pay the manufacturer for the engine. Accordingly, on 4 May 1999, the first defendant wrote to the plaintiff informing the latter of its intention and indicating that it was willing to repay the facility within two months by assigning to the plaintiff payments it would receive from MBB. On 20 July 1999, the plaintiff wrote to the first defendant agreeing to allow the first defendant to utilise the Bridging Line facility to purchase the engine provided the plaintiff received an undertaking from MBB to make payment direct to it (the plaintiff) instead of to Seri Mukali under the shipbuilding agreement for MT 'Sheta'. Instead on 10 August 1999, Seri Mukali wrote to the plaintiff giving its undertaking to pay the plaintiff. The plaintiff said this undertaking from Seri Mukali was completely unsolicited. On 27 August 1999, MBB wrote to the plaintiff giving its conditional undertaking to the plaintiff. On 2 September 1999 and 9 November 1999, the first defendant gave the plaintiff two Draw Down Notices respectively, requesting the plaintiff to release the money. The plaintiff permitted the above draw-downs as requested. The first defendant had fully settled the sum of RM175,856.40 which represents the amount utilised in the first Draw Down Notice. However the amount of

CAD615,600 (equivalent to RM1,615,950) together with interest thereon remains unpaid. Prior to the commencement of this suit, the plaintiff had written to MBB requesting to be paid the sum of CAD615,600 under the undertaking given by MBB but the plaintiff had not received any payment from MBB. On 24 May 2004 the plaintiff commenced this action against the defendants for the outstanding amount. The plaintiff's application for summary judgment and the defendants' application to strike out the plaintiff's claim were both dismissed with costs, hence this appeal. The question before the court was whether the defendants' assertion regarding novation gave rise to an issue which was triable. It was the defendants' contention that by reason of the alleged novation, the first defendant's liability to repay the plaintiff the RM2m under the Bridging Line Agreement had been substituted with the liability of MBB or Seri Mukali to do so, thereby releasing the first defendant of its liability to repay the RM2m to the plaintiff.

Held, granting the plaintiff's application and dismissing the defendants' application with costs:

(1) The defendants' assertion on novation was inconsistent with the first defendant's own conduct. According to the plaintiff the first defendant had since fully settled the sum of RM175,856.40 representing the amount utilised in the first Draw Down Notice. Given the stand of the defendants that the first defendant had been completely released from its liability to the plaintiff by the alleged novation, and given further, that MBB had given its 'undertaking' to the plaintiff by 20 July 1999 while Seri Mukali had done so by 10 August 1999 which were dates well before the first Draw Down Notice on 2 September 1999, it was inherently improbable that the first defendant would repay the plaintiff the RM175,856.40 if it had been released of its liability to do so. There was no averment from the defendants that this payment was made under a mistake or the like (see para 31).

(2) The undertaking of MBB or Seri Mukali when read, did not include the assumption of the first defendant's obligation or liability to pay the plaintiff the contractual interest for the principal sum of CAD615,000 (RM1,615,950). Accordingly, the facts did not support the defendant's assertion of a novation. The very documents relied on by the defendants, namely, the contemporaneous letters written by MBB and Seri Mukali were inconsistent with such a position (see para 33). Furthermore, the express provisions of the Bridging Line Agreement and the Guarantee respectively would operate to prevent the defendants from taking or successfully raising the novation plea (see para 34).

(3) In the light the first defendant having agreed to cl 10.02 and cl 14.01 of the Bridging Line Agreement which allow for the plaintiff to obtain further security without there being a transfer of the first defendant's liability under the Bridging Line Agreement, and to cl 25 which states that the rights and remedies of the plaintiff are cumulative, it was not open to the defendants to argue that the plaintiff had waived its rights under the Bridging Line Agreement or was estopped from enforcing its rights thereunder. The first defendant was clearly bound by the contract it had made and equity would not

come to its or the other defendants' aid in trying to avoid their contractual liability in the circumstances disclosed in this case. There was nothing unconscionable or unjust in the plaintiff exercising the very rights and remedies that the defendants agreed it should have in the Bridging Line Agreement and Guarantee. Accordingly, s 42 Contracts Act (about when a promisee accepts performance of the promise from a third party) and s 82 of the Contracts Act (about a surety being discharged when the principal debtor is released, etc) did not apply in this case (see para 39).

[Bahasa Malaysia summary

Plaintif adalah sebuah bank. Defendan pertama adalah pembina kapal. Defendan-defendan kedua hingga ketujuh adalah penjamin defendan pertama berkaitan satu pinjaman perantara yang diberikan kepada defendan pertama oleh plaintif. Defendan pertama sebagai pembina kapal telah memasuki satu kontrak untuk membina sebuah kapal, MT 'Sheta' untuk sebuah syarikat bernama Seri Mukali Sdn Bhd ('Seri Mukali'). Pada 26 Julai 1995, plaintif telah memberikan defendan pertama kemudahan perbankan sebanyak RM2j, dalam bentuk Garisan Perantara tertakluk kepada terma-terma dan syarat-syarat yang ditetapkan dalam Perjanjian Garisan Perantara pada tarikh yang sama ('Perjanjian Garisan Perantara'). Seri Mukali juga telah memperoleh pembiayaannya sendiri untuk membayar defendan pertama untuk membina MT 'Sheta' daripada Malayan Banking Bhd ('MBB'). Defendan pertama perlu memasang enjin marin dalam kapal tersebut yang ia telah pesan daripada pembekal di Kanada, Ulstein Maritime Ltd, dan ingin menggunakan kemudahan Garisan Perantara tersebut untuk membayar pembekal untuk enjin itu. Oleh itu, pada 4 Mei 1999, defendan pertama telah menulis kepada plaintif memaklumkan tentang niatnya dan membayangkan bahawa ia sanggup membayar balik kemudahan itu dalam tempoh dua bulan dengan memberikan plaintif bayaran-bayaran yang ia akan terima daripada MBB. Pada 20 Julai 1999, plaintif telah menulis kepada defendan pertama bersetuju membenarkan defendan pertama menggunakan kemudahan Garisan Perantara itu untuk membeli enjin itu dengan syarat plaintif menerima akujanji daripada MBB untuk membuat bayaran terus kepadanya (plaintif) dan bukan kepada Seri Mukali di bawah perjanjian pembinaan kapal untuk MT 'Sheta'. Namun pada 10 Ogos 1999, Seri Mukali telah menulis kepada plaintif memberikan akujanjinya untuk membayar plaintif. Plaintif mengatakan akujanji daripada Seri Mukali tidak boleh diterima.

Pada 27 Ogos 1999, MBB telah menulis kepada plaintif memberikan satu akujanji bersyarat kepada plaintif. Pada 2 September 1999 dan 9 November 1999, defendan pertama memberikan plaintif dua Notis Pengeluaran masing-masingnya, meminta plaintif melepaskan wang tersebut. Plaintif dibenarkan pengeluaran di tas seperti yang dipohon. Defendan pertama telah melangsaikan keseluruhan jumlah RM175,856.40 yang mewakili jumlah yang digunakan dalam Notis Pengeluaran pertama. Namun jumlah CAD615,600 (bersamaan RM1,615,950) bersama faedah atasnya masih belum berbayar. Sebelum mulanya guaman ini, plaintif telah menulis kepada MBB meminta dibayar jumlah CAD615,600 di bawah akujanji yang diberikan oleh MBB tetapi plaintif tidak menerima apa-apa bayaran daripada MBB. Pada 24 Mei 2004, plaintif telah memulakan tindakan ini terhadap defendan-defendan untuk jumlah yang tertunggak. Permohonan plaintif untuk

penghakiman terus dan permohonan defendan-defendan untuk membatalkan tuntutan plaintif telah ditolak kedua-duanya, oleh itu rayuan ini dikemukakan. Persoalan di hadapan mahkamah adalah sama ada penegasan defendan-defendan berkaitan novasi menimbulkan satu persoalan yang perlu dibicarakan. Adalah hujah defendan-defendan bahawa oleh sebab novasi yang dikatakan itu, liabiliti defendan pertama untuk membayar balik plaintif RM2j di bawah Perjanjian Garisan Perantara telah digantikan dengan tanggungjawab MBB atau Seri Mukali untuk berbuat demikian, oleh itu melepaskan defendan pertama daripada liabiliti untuk membayar balik RM2j itu kepada plaintif.

Diputuskan, membenarkan permohonan plaintif dan menolak permohonan defendan-defendan dengan kos:

(1) Penegasan defendan-defendan berhubung novasi tidak konsisten dengan perlakuan defendan pertama sendiri. Menurut plaintif, defendan pertama telah melangsaikan keseluruhan jumlah RM175,856.40 yang mewakili jumlah yang digunakan dalam Notis Pengeluaran pertama. Berdasarkan pendirian defendan-defendan bahawa defendan pertama telah dilepaskan keseluruhan liabilitinya kepada plaintif oleh novasi yang dikatakan, dan seterusnya, bahawa MBB telah memberikan 'akujanji'nya kepada plaintif sebelum 20 Julai 1999 manakala Seri Mukali telah berbuat demikian sebelum 10 Ogos 1999 yang merupakan tarikh-tarikh sebelum Notis Pengeluaran pertama pada 2 September 1999, ia tidaklah berkemungkinan yang defendan pertama akan membayar balik plaintif RM175,856.40 jika ia telah dilepaskan daripada liabiliti untuk berbuat demikian. Tiada penegasan daripada defendan-defendan yang bayaran ini merupakan satu kesilapan (lihat perenggan 31).

(2) Akujanji MBB atau Seri Mukali apabila dibaca, tidak termasuk andaian tanggungjawab atau liabiliti defendan pertama untuk membayar plaintif faedah kontraktual untuk jumlah utama CAD615,600 (RM1,615,950). Oleh demikian, fakta-fakta tidak menyokong penegasan defendan-defendan berhubung satu novasi. Dokumen-dokumen yang digunakan oleh defendan-defendan, iaitu, surat-surat yang ditulis oleh MBB dan Seri Mukali adalah tidak konsisten dalam kedudukan sedemikian (lihat perenggan 33). Tambahan pula, peruntukan nyata Perjanjian Garisan Perantara dan Jaminan tersebut masing-masingnya beroperasi untuk menghalang defendan-defendan daripada mengambil atau menimbulkan novasi (lihat perenggan 34).

(3) Berdasarkan persetujuan defendan pertama terhadap kl 10.02 dan kl 14.01 dalam Perjanjian Garisan Perantara yang membenarkan plaintif untuk mendapatkan cagaran tanpa sebarang pemindahan liabiliti defendan pertama di bawah Perjanjian Garisan Perantara, dan kepada kl 25 yang menyatakan bahawa hak dan remedi plaintif adalah kumulatif, ia tidak terbuka kepada defendan-defendan untuk berhujah bahawa plaintif telah mengetepikan haknya di bawah Perjanjian Garisan Perantara atau diestopkan daripada menguatkuasakan haknya. Defendan pertama jelas terikat oleh kontrak yang ia telah buat dan ekuiti tidak dapat membantunya atau defendan-defendan lain yang telah cuba mengelakkan diri daripada liabiliti kontraktual masing-masing dalam keadaan yang dikemukakan dalam kes ini. Tiada apa-apa yang tidak

berpatutan atau tidak adil di mana plaintif menggunakan hak dan remedi yang defendan-defendan telah bersetuju ia patut ada dalam Perjanjian Garisan Perantara dan Jaminan itu. Oleh demikian, s 42 Akta Kontrak (tentang bila satu janji menerima pelaksanaan janji itu daripada pihak ketiga) dan s 82 Akta Kontrak (tentang penjamin yang dilepaskan apabila penghutang utama dilepaskan, dsb) tidak terpakai dalam kes ini (lihat perenggan 39).]

Notes

For a case on existence of novation, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 3956.
For cases on loan, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2783–2785.

Cases referred to

Balak Ram v Telu Air [1935] Lahore 897 (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)
Government of Malaysia v Adnan bin Awang & Ors [1980] 2 MLJ 291 (refd)
Housing and Development Board v Lee Sem Yoong Sdn Bhd [1987] 2 MLJ 204 (refd)
LYL Hooker Sdn Bhd v Tevanaigam Savisthri & Anor [1987] 2 MLJ 52 (refd)
Malaysian International Merchant Bankers Berhad v Datuk Mohd Salleh & Anor [1988] 2 CLJ 90 (refd)
Teoh Kee Keong v Tambun Mining Co Ltd [1968] 1 MLJ 39 (refd)
Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9 (refd)

Legislation referred to

Contracts Act [India] s 62
Contracts Act 1950 ss 42, 63, 82
Contracts (Malay States) Ordinance 1950 s 63
Rules of the High Court 1980 O 14, O 18 r 19(b), (c), (d)

Albert Tang (Chew Jugah Wan Ullok & Co) for the plaintiff.
Victor Ng (Leong Hsin Ru with him) (Tang & Partners) for the defendants.

Clement Skinner J:

[1] There are two appeals before me. They both arise from the decision of the learned deputy registrar. On 26 January 2005, he dismissed with costs the plaintiff's application for summary judgment against all the defendants under O 14 of the Rules of the High Court 1980 ('the RHC'). He also dismissed with costs the defendants' application to strike out the plaintiff's claims under O 18 r 19(b), (c) and (d) of the Rules of the High Court 1980 ie, the second, third and fourth limbs of the rule.

[2] The brief facts leading to these appeals are these.

[3] The plaintiff is a bank. The first defendant is a shipbuilder. At all material times the second to seventh defendants were directors of the first defendant and had acted

as guarantors of the first defendant in respect of a bridging loan granted to the first defendant by the plaintiff. The fifth defendant has passed away and the plaintiff does not pursue this action against his estate.

[4] The first defendant as shipbuilder had entered into a contract to build a vessel, the MT 'Sheta' for a company called Seri Mukali Sdn Bhd ('Seri Mukali'). On 26 July 1995, the plaintiff granted the first defendant banking facilities of RM2m, in the form of a Bridging Line upon terms and conditions set out in a Bridging Line Agreement of the same date ('the Bridging Line Agreement').

[5] Seri Mukali also obtained its own financing to pay the first defendant for the building of MT 'Sheta'. It obtained a loan from Malayan Banking Berhad ('MBB').

[6] The first defendant needed to install a marine engine in the vessel which it had ordered from the manufacturer in Canada, Ulstein Maritime Ltd, and wished to utilise the Bridging Line facility to pay the manufacturer for the engine. Accordingly, on 4 May 1999, the first defendant wrote to the plaintiff informing the latter of its intention and indicating that it was willing to repay the facility within two months by assigning to the plaintiff payments it would receive from MBB. This is how the material parts of the first defendant's letter of 4 May 1999 to the plaintiff reads:

> Seri Mukali Sdn Bhd has already obtained its financing for the above project from Malayan Banking Berhad (copy enclosed). But, it takes time to do the paper work before the draw down. In order not to delay the project, we sincerely hope you can consider our request favourably.
>
> For this purpose, we will assign the payment from Malayan Banking Berhad up to RM2.0 million to Bank Industri Malaysia Berhad.
>
> We estimate that the utilisation of the Bridging Line will not be more than two months.

[7] In response to the first defendant's request, the plaintiff wrote back on 19 May 1999 wanting more details about Seri Mukali's claims against MBB. On 20 July 1999 the plaintiff wrote to the first defendant agreeing to allow the first defendant to utilise the Bridging Line facility to purchase the engine provided the plaintiff received an undertaking from MBB to make payment direct to it (the plaintiff) instead of to Seri Mukali under the shipbuilding agreement for MT 'Sheta'. The material part of the plaintiff's letter of 20 July 1999 to the first defendant reads:

> Further to your letter dated 14 July 1999 pertaining to the utilisation of the abovementioned facility for the issuance of letter of credit in respect of the engine to be installed in the vessel financed by Maybank, please be informed that we would be agreeable on such arrangement provided Maybank agrees to give us an undertaking to make payment directly to Bank Industri upon finalisation of heir loan with Seri Mukali Sdn Bhd based on the progress claims as reflected in the shipbuilding agreement of MT Sheta.

[8] In response to the above letter, the first defendant wrote to the plaintiff on 9 August 1999 saying that since it was Seri Mukali who was obtaining the loan from MBB, it was Seri Mukali and not MBB who should give the undertaking requested by the plaintiff.

[9] The next day, ie on 10 August 1999, Seri Mukali wrote to the plaintiff giving its undertaking to pay the plaintiff. The plaintiff says this undertaking from Seri Mukali was completely unsolicited. Seri Mukali's letter of 10 August 1999 reads in its material parts:

> We hereby confirmed (sic) and undertake to pay to Bank Industri Malaysia Berhad for the amount of RM2,000,000 (Ringgit Malaysia Two Million only) provided by you to ISSB under the bridging facility for MT 'Sheta' once the disbursement of the loan made available by Maybank Berhad.
>
> Should the undertaking be defaulted (sic), we shall take full responsibility and liability for the said amount.

[10] On 27 August 1999, MBB wrote to the plaintiff giving its conditional undertaking to the plaintiff in the following terms:

> We wish to confirm subject to and conditional upon a valid and satisfactory documentary evidence(s) from Bank Industri Malaysia Berhad (BIMB) that payments have been made to Ironwood Shipyard Sdn Bhd and subject to the latter's confirmation that they have received the said payments, we will undertake to release the payments due to Ironwood Shipyard for claims to be made for MT 'Sheta' upon finalisation of our legal documentation, directly to you.

[11] Referring briefly now to the Bridging Line Agreement, the first defendant had by its terms agreed, inter alia, to pay interest on the facility at 2% above the plaintiff's Base Lending Rate ('BLR') and to utilise the facility only after giving to the plaintiff Draw Down Notices in respect of any amount to be utilised.

[12] On 2 September 1999 and 9 November 1999, the first defendant gave the plaintiff two Draw Down Notices respectively, requesting the plaintiff to:

(a) pay 10% down-payment amounting to CAD68,400 (Canadian Dollars Sixty Eight Thousand & Four Hundred only) by wire transfer to Ulstein Maritime Ltd as per Proforma Invoice No. 1954-01 dated 16 March 1998 on behalf of the first defendant;

(b) arrange for an Irrevocable Letter of Credit amounting to CAD615,600 (Canadian Dollars Six Hundred Fifteen Thousand & Six Hundred only) in favour of Ulstein Maritime Ltd being balance of 90% as per Proforma Invoice No. 1954-01 dated 16 March 1998 on behalf of the first defendant.

[13] The plaintiff permitted the above draw-downs as requested. The first defendant has fully settled the sum of RM175,856.40 which represents the amount utilised in the first Draw Down Notice. However the amount of CAD615,600 (equivalent to RM1,615,950 based on the exchange rate of CAD1 to RM2.6250) together with interest thereon remains unpaid.

[14] Prior to the commencement of this suit, the plaintiff had on 9 March 2000 and 6 April 2001 respectively, written to MBB requesting to be paid the sum of CAD615,600 or RM1,615,950 under the undertaking given by MBB but the plaintiff has not received any payment from MBB.

[15] On 24 May 2004, the plaintiff commenced this action against the defendants. On 5 August 2004 it amended its writ and statement of claim to indicate that the sum of RM1,933,587.79 claimed in the writ was the amount outstanding as at 24 March 2004.

[16] The essential facts I have outlined above are not in dispute between the parties. What is in dispute are the legal consequences that flow from them. While the plaintiff maintains that the defendants do not have a bona fide defence on the merits to its claim, the defendants say that the first defendant has been released of its obligation to repay the amounts due under the Bridging Line Agreement because there is 'a valid and operative novation of the previous debt owing by the first defendant to MBB and/or Seri Mukali'. The second to seventh defendants say as guarantors that since the first defendant (as principal debtor) has been released of its debt, they too have become discharged of their liability under the guarantee. All the defendants say that as a 'result of the novation', the plaintiff cannot sue the first defendant on the original contract and is now precluded and estopped from pursuing its claim against them as the plaintiff had waived its rights to do so. The defendants contend that the plaintiff should look to MBB and/or Seri Mukali for repayment of the amount claimed. Hence, the plaintiff's application for summary judgment and the defendants' application to strike out the plaintiff's claim.

[17] Before considering the merits of the applications, I wish to deal with three matters. First, the nature of the proceedings before me. Although this is an appeal from the decision of the deputy registrar, it proceeds before me by way of a re-hearing. Also the deputy registrar gave no reasons for his decision. Accordingly, I am not bound by his decision. Secondly, the defendants resisted the plaintiff's application on the same grounds as they relied on to strike out the plaintiff's claim, namely, that there had been an assignment of the debt owing to the plaintiff to MBB and/or Seri Mukali. However, when this matter was argued before me the defendants abandoned their assignment ground and argued their case solely on the novation point, it being the defendants' contention that 'novation' is a 'sub-species' or a form of assignment which in turn, according to them, allows them to maintain that the first defendant had been released of its liability to the plaintiff who is estopped from bringing this claim against them as the plaintiff had waived all its rights to do so. In view of the stand taken by the defendants before me I will confine myself to the novation argument raised by the defendants.

[18] Thirdly, I wish to briefly deal with the approach a court should take when hearing an application under O 14 or under O 18 r 19 of the RHC. In respect of an application for summary judgment under O 14 of the RHC, I have for my guidance the decision of the Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400. In particular, I refer to what Mohamed Azmi SCJ said in an application under O 14 (at p 408):

> [T]he court [has] to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable.

[19] And later on the same page when his Lordship said:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable...Thus apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[20] With regard to an issue of law being raised by way of defence, his Lordship said:

> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'.

[21] With regard to the approach which a court takes when hearing an application under any of the limbs under O 18 r 19, I have for my guidance what was said in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 where at p 43, it was stated (per Mohamed Dzaiddin SCJ) that:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence... The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[22] With that I turn to consider the substantive applications before me. With regard to the plaintiff's application for summary judgment against the defendants, the real question before the court is whether the defendants' assertion regarding novation gives rise to an issue which is triable in the sense referred to in the Bank Negara Malaysia case. In deciding this issue, a convenient starting point will be to consider the law regarding novation. I also wish to say at the outset that I do not regard the point on novation to be so complex that it is not suitable to be summarily decided here. This has also been the position of both parties. Neither of them has submitted that the issue of novation is not suitable to be decided on this application. Now to the law.

[23] Section 63 of the Contracts Act 1950 states:

> If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

[24] In *Teoh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39, the Federal Court discussed s. 63 of the Contracts Ordinance which is in pari materia to the present s 63 of the Contracts Act 1950 and said (per Ong Hock Thye FJ) at p 43:

> The effect of section 63 of the Contracts Ordinance is thus stated in Halsbury (3rd Ed) p 262:
>
> > Novation is, in effect, a form of assignment in which, by the consent of all parties, a new contract is substituted for an existing contract. Usually, but not necessarily, a new person becomes party to the new contract, and some person who was party to the old contract is discharged from further liability. The introduction of a new party prevents the new contract from being a mere accord and without satisfaction and thus affords a defence to any action upon the old contract..

[25] And in *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9, the Federal Court quoted with approval the following observations made by Din Mohamed J on s 62 of the Indian Contracts Act which was equivalent to s 63 of the Contracts (Malay States) Ordinance 1950 in *Balak Ram v Telu Air* [1935] Lahore 897, namely:

> From the clear wording of this section it will appear that it is not always necessary to prove that a new contract had been substituted. It is enough if an alteration in the original contract is proved...

[26] While the consent of all the parties involved in a novation is an absolutely essential element, case law shows that consideration and intention are also necessary elements in a novation. In *LYL Hooker Sdn Bhd v Tevanaigam Savisthri & Anor* [1987] 2 MLJ 52, the Supreme Court held:

> Novation is a new contract. It extinguishes rights and obligations under the old contract for which the new contract is made. Being a new contract, there must be consent by all the parties and there must be consideration, the rights and obligations under it are not those transferred from the old contract which is already extinguished.

[27] And in *Government of Malaysia v Adnan bin Awang & Ors* [1980] 2 MLJ 291 Wan Yahya J said (at p 292):

> ... the party claiming such relief must not only show the intention to novate or that the terms of the subsequent contract are so inconsistent with the former one as to imply that intention but he must also prove that all the parties to the former contract have consented to the terms of the subsequent one.

[28] As I said earlier, it is the assertion of the defendants that 'there is in existence a valid and operative novation of the previous debt owing by the first defendant to MBB and/or Seri Mukali'. According to the defendants there was a novation because all the parties ie, the plaintiff by its letter of 20 July 1999, MBB by its conditional undertaking in its letter of 27 August 1999 and Seri Mukali by its letter of undertaking dated 10 August 1999 had consented to it. The defendants contend that from the contents of all the letters I earlier mentioned when introducing the facts and

in particular the three letters just mentioned, it is evident that the parties involved intended to have a novation of the first defendant's obligations 'in order to substitute the liability of the first defendant with Seri Mukali and/or MBB'. The defendants further contend that the mutual exchange of promises formed the consideration for the novation, in that, MBB and/or Seri Mukali undertook to be fully responsible and liable for the debt owing to the plaintiff and in return the plaintiff acquired the right to pursue against MBB and/or Seri Mukali. Furthermore, the plaintiff's release of the first defendant from an existing obligation is good consideration for a promise by MBB and/or Seri Mukali to undertake a fresh obligation, being an obligation to do something in future. Accordingly, it was the submission of the defendants that there was a valid novation in effect.

[29] The plaintiff denies that there was any such novation or that it had given its consent to such alleged novation.

[30] The question is: Does the defendants' assertion about a novation give rise to a triable issue? For the reasons that follow, I do not find so.

[31] In the first place, it is the defendants' contention that by reason of the alleged novation, the first defendant's liability to repay the plaintiff the RM2m under the Bridging Line Agreement has been substituted with the liability of MBB or Seri Mukali to do so, thereby releasing the first defendant of its liability to repay the RM2 million to the plaintiff. If this is so then I find the defendants' assertion inconsistent with the first defendant's own conduct. It will be recalled that the first defendant utilised the Bridging Line by two Draw Down Notices. According to the plaintiff, the first defendant has since fully settled the sum of RM175,856.40 representing the amount utilised in the first Draw Down Notice. This material assertion which is made in para 10 of the affidavit of Norulhadi affirmed on 18 August 2004 in support of the plaintiff's application is not denied or disputed by the defendants. Given the stand of the defendants that the first defendant has been completely released from its liability to the plaintiff by the alleged novation, and given further, that MBB had given its 'undertaking' to the plaintiff by 20 July 1999 while Seri Mukali had done so by 10 August 1999 which are dates well before the first Draw Down Notice on 2 September 1999, I find it inherently improbable that the first defendant would repay the plaintiff the RM175,856.40 if it had been released of its liability to do so. There is no averment from the defendants that this payment was made under a mistake or the like.

[32] In the second place, as the case law shows a novation results in a substitution of liabilities; a new contract is substituted for an existing contract whereby, usually, but not necessarily, a new person becomes party to the new contract and some person who was party to the old contract is discharged from further liability. This position is well brought out in *Housing and Development Board v Lee Sem Yoong Sdn Bhd* [1987] 2 MLJ 204 where it was held (at p 206):

> The Supreme Court of India in *Khardah Co. Ltd v. Raymon & Co. (India) Pte Ltd Admiralty in Rem* [1962] SC 1810, 1817, also held that as a rule obligations under a contract cannot be assigned except with the consent of the promisee and it becomes a novation resulting in

substitution of liabilities. On the other hand, rights under a contract are assignable unless the contract is personal in nature or the rights are incapable of assignment.

[33] Reverting to the facts of our case, the defendants assert that the first defendant has been released of all its liabilities and obligations under the Bridging Line Agreement because MBB or Seri Mukali has, as the new party, agreed to take over the first defendant's liability. But the undertaking of MBB or Seri Mukali when read, do not include the assumption of the first defendant's obligation or liability to pay the plaintiff the contractual interest for the principal sum of CAD615,000 (RM1,615,950). Accordingly the facts do not support the defendant's assertion of a novation. The very documents relied on by the defendants, namely, the contemporaneous letters written by MBB and Seri Mukali are inconsistent with such a position.

[34] In the third place, the defendants' assertion about there being a novation cannot be considered in isolation or in a vacuum so to speak. It falls to be decided in the context of other undisputed contemporaneous documents signed by the first defendant and the other defendants, namely, the Bridging Line Agreement and Guarantee respectively. Accordingly, while it is the defendants' case that by asking the first defendant to be provided with the undertaking referred to, the plaintiff had consented to their being released of liability under the Bridging Line Agreement and the Guarantee respectively; I do not agree with this contention. Instead I agree with the submission of Mr Tang that the express provisions of the Bridging Line Agreement and the Guarantee respectively would operate to prevent the defendants from taking or successfully raising such a plea.

[35] As far as the first defendant is concerned s 10.02 of the Bridging Line Agreement allows for the plaintiff taking further security and reads:

> Section 10.02 Covenant to Provide Further Security
>
> The Borrower shall at any time if and when required by the Bank so to do execute in favour of the Bank as the Bank shall direct such legal or other mortgages charges assignments transfers or agreements or as the Bank shall require of and on all the Borrower's estate right title and interest in any property or assets or business now belonging to or which may hereafter be acquired by or belong to the Borrower (including any vendor's lien) and the benefit of all licences held in connection therewith to secure all moneys and liabilities hereby agreed to be paid or intended to be hereby secured such mortgages charges assignments transfers or agreements to be prepared by or on behalf of the Bank at the cost of the Borrower and to constrain all such terms and conditions as the Bank may reasonably require.

[36] Further, s 14.01 reads:

> Section 14.01 Assignment
>
> This Agreement shall be binding upon and ensure (sic: enure) to the benefit of the parties hereto and their respective successors and assigns, *except that the Borrower may not assign its rights or transfer its obligations hereunder.*

[37] There is also section 25 which reads: A

> Waiver
>
> No failure or delay by the Bank in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial execution of any right, power or privilege preclude any further exercise thereof or the exercise of any right, power or privilege. The rights and remedies herein provided are cumulative and not exclusive of any rights and remedies provided by law. B

[38] In my judgment, the above provisions clearly allow the plaintiff to request for additional security from the first defendant in the form of the undertaking from MBB or Seri Mukali without the first defendant having transferred its obligations under the Bridging Line Agreement to MBB or Seri Mukali in having done so. In fact cl 14.01 which expressly provides that the first defendant may not transfer its obligations thereunder effectively puts paid to the defendants' argument that the plaintiff had expressly or impliedly consented to the novation. In the light of the express prohibition to a transfer of liability, there can be no room to infer consent as suggested by counsel for the defendants. C D

[39] Likewise, in light of the first defendant having agreed to cl 10.02 and cl 14.01 which allow for the plaintiff to obtain further security without there being a transfer of the first defendant's liability under the Bridging Line Agreement, and to cl 25 which states that the rights and remedies of the plaintiff are cumulative I do not see how it is open to the defendants to argue that the plaintiff has waived its rights under the Bridging Line Agreement or is estopped from enforcing its rights thereunder. The first defendant is clearly bound by the contract it has made and equity will not come to it or the other defendants' aid in trying to avoid their contractual liability in the circumstances disclosed in this case. There is nothing unconscionable or unjust in the plaintiff exercising the very rights and remedies that the defendants agreed it should have in the Bridging Line Agreement and Guarantee. Accordingly, I see nothing in the arguments raised by the defendants on s 42 of the Contracts Act (about when a promisee accepts performance of the promise from a third party) or s 82 of the Contracts Act (about a surety being discharged when the principal debtor is released etc). E F G

[40] In support of his contention that consent to novate may be inferred from conduct, counsel referred me to the case of *Malaysian International Merchant Bankers Berhad v Datuk Mohd Salleh & Anor* [1988] 2 CLJ 90 where it was held, inter alia, that whether there was consent to novation may, however, be inferred from conduct without express words. I find Malaysian International clearly distinguishable on its facts. According to the headnotes in that case 'the first defendant borrowed monies from the plaintiff and failed to repay. The second defendant later undertook to pay the said sums in consideration of the plaintiff's forbearance to sue the defendant'. The facts show that the second defendant there had written to the plaintiff, inter alia, as follows: H I

In consideration of your forbearing to commence any legal or other proceedings to recover all sums due and outstanding from DMSY to MIMB, I hereby irrevocably and unconditionally undertake to pay you the full sum of the loan and interest outstanding by 30 September 1985.

[41] Subsequently, the second defendant forwarded a cheque for RM500,000 towards settlement of the loan of RM2,300,000 and the cheque was cleared. Reverting to that case once again, it shows that 'The plaintiff sued for the monies due and owing. The defendants averred in the defence, inter alia, novation. The plaintiff applied to enter final judgment under O 14 of RHC. The senior assistant registrar refused to allow the plaintiff's application and the plaintiff appealed against the decision to the judge in chambers'. The learned judge (Gunn Chit Tuan J as he then was) held that the defendants' plea of novation raised a triable issue because the question whether there was consent to novation was a matter that could be inferred from conduct of the parties which was a matter best decided at the trial. Clearly the facts here are distinguishable. Nothing in the nature of an agreement to forbear to sue has been entered into in this case and neither had the plaintiff here accepted any payment from a third party as consideration for that forbearance to sue.

[42] As far as the second, third, fourth, sixth and seventh defendants are concerned, the relevant provisions of the guarantee which will defeat their argument that they have been discharged of their liability to the plaintiff by virtue of the alleged novation, or that the plaintiff had waived its rights against them and is now estopped from bringing this action, are these:

Article III Covenant to Repay the Credit Facilities

Section 3.01

As an inducement to BIMB agreeing to grant to the borrower the Bridging Line Facilities and in consideration of BIMB having at the request of the guarantors agreed to grant to the borrower the Bridging Line Facilities, the guarantors hereby unconditionally and irrevocably jointly and severally guarantee as principal debtors and not merely as sureties to BIMB the repayment by the borrower of the Bridging Line Facilities together with interest commission and all other costs and charges (including solicitors' costs based on solicitor and client basis) and all other sums payable by the borrower to BIMB under or pursuant to the security document (s), ('the maximum recoverable sum') and the due performance and observance of all the agreements covenants and undertakings on the part of the borrower therein contained.

Article IV Continuing Liability of the Guarantors

Section 4.01

The obligations of the guarantors hereunder shall not be discharged except by performance and then only to the extent of such performance. Such obligations shall not be subject to any prior notice or demand to the guarantors with regard to any default of the borrower and shall not be impaired by any extension of time forbearance or concession given to the borrower or any assertion of or failure to assert any right or remedy against the borrower or in respect of any security created by or in pursuance of the security document (s) and or any modification or amplification of the provisions thereof contemplated by the terms thereof or any failure of the borrower to comply with any requirements of any law regulation or order in Malaysia or of any political subdivision or agency thereof.

Section 4.02

The Guarantors shall not be discharged or released from this Guarantee by any arrangement entered into or any composition accepted by BIMB modifying its rights and remedies under the Security Document (s) whether with or without the assent of the Guarantors or by any alteration in the obligations terms stipulation covenants and undertakings contained in the Security Document (s) or by any forbearance whether as to payment time performance or otherwise.

Article V Indulgence

Section 5.02

BIMB shall have full power at its discretion to give time for payment or to make any other arrangements with any other person or persons or corporation without prejudice to this present Guarantee or any liability hereunder.

Article VI Securities held by BIMB

Section 6.01

This Guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by BIMB for all or any part of the monies hereby guaranteed nor shall such collateral or other security or lien to which BIMB may be otherwise entitled or the liability or any person or persons or corporation not parties hereto for all or any part of the monies hereby secured be in any way prejudiced or affected by this present Guarantee. The Guarantors shall make no claim to such collateral or other security or any part thereof of any interest therein unless and until BIMB shall have received the full amount hereby guaranteed hereunder.

[43] In light of the very clear provisions of all the above cl 25 found in the guarantee by which the second, third, fourth, sixth and seventh defendants are so clearly bound, I cannot see how they can hope to escape liability by the arguments they have advanced. Since by these clauses these defendants, as guarantors, had agreed that their liability was as principal debtors and not merely as sureties; that their obligations shall not be discharged except by performance and then only to the extent of such performance; that they shall not be discharged or released from the guarantee by any arrangement entered into by the plaintiff modifying its rights and remedies under the Bridging Line Agreement or by any alteration in the obligations term stipulation covenants and undertakings contained in the Bridging Line Agreement; that the plaintiff shall have full power at its discretion to make any arrangements with any other person or persons or corporation without prejudice to the guarantee or their liability thereunder; that the guarantee they had given shall be in addition to and shall not in any way be prejudiced or affected by any collateral or other security 'now or hereafter' held by the plaintiff nor shall such collateral or other security to which the plaintiff may be otherwise entitled or the liability of any party not a party to the guarantee for all or any part of the monies 'hereby secured' be in any way prejudiced or affected by the guarantee they had given, the above clauses when read together are a complete answer to their contention that they have been discharged as guarantors based on their arguments of novation, waiver and estoppel. Clearly, they have not been so discharged.

[44] Having subjected the defendants' assertions to the curial scrutiny which the Federal Court called for in the Bank Negara Malaysia case, I find for all the reasons

given earlier, that no triable issues have been raised by the defendants to the plaintiff's claim. In the result I grant the plaintiff's application with costs.

[45] There will be judgment for the plaintiff in the terms prayed for.

[46] Turning now to the defendants' application to strike out the plaintiff's claim, I do not think it can be seriously argued that the plaintiff's claim herein is on the face of it 'obviously unsustainable' On the contrary, on the facts earlier set out and for the reasons I gave in saying that the defendants have not raised any triable issue to the plaintiff's claim, it must follow that the defendants' application must be dismissed with costs which I now do.

Plaintiff's application allowed.

Reported by Loo Lai Mee